Supreme Court, U.S.
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No. 05-54

IN THE

# Supreme Court of the United States

JON RILEY HAYS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I.

Whether the element "affects interstate or foreign commerce" in 18 U.S.C. § 1365 requires that the accused's conduct affect interstate commerce either at the time of the alleged tampering or afterwards, but not before.

II.

Whether the plea of guilty and resulting conviction of Petitioner Jon Riley Hays were the result of ineffective assistance of counsel, more specifically:

A) The plea was not "intelligent" because counsel induced the accused to plead guilty to a non-existent crime; and/or

B) The plea was not "voluntary" because counsel induced the accused to plead guilty by threats and/or misrepresentation.

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the denial of the Petitioner's Motion under 28 U.S.C. § 2255 (Supp. 2002), is reported at *Hays v. United States*, 397 F.3d 564 (7th Cir. 2005) February 10, 2005) (No. 04-2456), and is reproduced in Appendix A at pp. 1a-11a. Rehearing and rehearing en banc was denied by the Seventh Circuit on April 6, 2005, and is reproduced in Appendix D at pp. 17a-18a.

The opinion of the United States District Court for the Southern District of Illinois, denying the Petitioner's § 2255 Motion in *Hays v. United States*, Docket No. 03-CV-00310-DRH, was filed on May 19, 2004 and is not reported. This opinion is reproduced in Appendix C at pp. 15a-16a. The District Court granted the Petitioner's motion for Certificate of Appealability on June 1, 2004 and is not reported. This Order is reproduced in Appendix B at pp. 12a-14a.

## JURISDICTION OF THIS COURT

The Seventh Circuit entered final judgment on April 6, 2005, when the Court denied the Petition For Rehearing. This Court has jurisdiction to review the final judgment from a Court of Appeals pursuant to 28 U.S.C. § 1254 (Supp. 2002). This petition for certiorari is filed within ninety (90) days of entry of the final order for which review is sought, as required by Supreme Court Rule 13.

## STATUTES INVOLVED

18 U.S.C. § 1365(a) provides:

*Tampering With Consumer Products.*

Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce, or the labeling of, or container for, any such product, or attempts to do so, shall [be fined or imprisoned].

28 U.S.C. § 2255 provides:

*Federal Custody, Remedies On Motion Attacking Sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

## STATEMENT OF THE CASE

This case presents the issue of whether the Tenth Circuit Court of Appeals or the Seventh Circuit Court of Appeals is correct in construing the "affects interstate or foreign commerce" element of 18 U.S.C. § 1365. The Tenth Circuit requires proof that the conduct of the accused has had an effect on interstate commerce either at the time of the alleged tampering, or after, but not before. *See United States v. Levine*, 41 F.3d. 607 (10th Cir. 1994). Conversely in the case at bar, the Seventh Circuit in construing the "affects interstate or foreign commerce" element, holds that such proof of present or future effect is not required. In addition, the Seventh Circuit holds that proof of an effect on interstate commerce before the alleged tampering can satisfy § 1365. *See Hays v. U.S.*, 397 F.3d at 564.

The determination of the first question presented, i.e., whether the Tenth or Seventh Circuit is correct, provides an answer to half of the second question presented in this Petition. If the Tenth Circuit's construction of § 1365 is correct, then Petitioner John Riley Hays ("Hays") was deprived of effective assistance of counsel because counsel induced Hays to plead to an alleged violation of § 1365 when Hays' conduct did not violate § 1365. Therefore, Hays' plea was not "intelligent."

The other half of the second question presented is whether Hays was deprived of effective assistance of counsel because counsel induced Hays to plead guilty by threats and/or misrepresentation to crimes of which he was actually innocent and therefore Hays' plea was not "voluntary."

The relief requested is that Hays' conviction on both counts be vacated, his guilty plea be withdrawn, and he be allowed a trial.

The facts material to consideration of the questions presented are found in the original § 2255 Motion, filed *pro se* by Hays from the federal prison at Marion, Illinois on May 19, 2003 (excerpts reproduced in Appendix H at pp. 29a-34a); the Change of Plea Transcript dated July 27, 2001 (excerpts reproduced in Appendix E at pp. 19a-22a), and the Sentencing Transcript dated May 17, 2002 (excerpts reproduced in Appendix F at pp. 23a-25a). Hays' original § 2255 motion was filed under oath. The District Court denied his motions for discovery and an evidentiary hearing. The District Court had jurisdiction under 28 U.S.C. § 1331 (Supp. 2002) to hear Hays' § 2255 Motion, because the underlying convictions involved violations of federal law. The Government never filed any affidavits or testimony to rebut the facts as sworn under oath by Hays. The facts as stated in this Petition are undisputed and uncontradicted in the evidence.

Dr. Hays was a medical doctor practicing in Southern Illinois. In early 2000, he injured his back in a car accident. Hays took Oxycontin for pain. He subsequently became involuntarily addicted to the drug (Appendix H, p. 31a). As a result, Hays began to prescribe Oxycontin to patients who did not need the drug so that he could steal it from those patients for his own use.

Dr. Hays also prescribed and administered Oxycontin to at least one woman, Grethel Ford, a cancer patient, who did have a need for the drug. The Government prosecutor told the District Court at the Change of Plea Hearing, "that

individual did have cancer, and apparently the drug was prescribed appropriately." (Appendix E, pp. 20a-21a). There was no evidence that Hays stole Oxycontin from Grethel Ford or from any other patient who had a medical need for the drug.

Dr. Hays swore in his § 2255 proceeding: "I never prescribed Oxycontin to another person to be used improperly." (Appendix H, p. 31a). The Government chose not to rebut this assertion at any time before sentencing. In fact, the Government admitted at the Sentencing Hearing: "Now, the Government does not and has not tendered any evidence that the doctor's conduct in fact caused any harm." (Appendix F, p. 25a).

Dr. Hays was arrested by the Drug Enforcement Agency ("DEA"). He hired Terry M. Green as his lawyer in early 2001 (*See generally* Appendix H). Hays originally pled not guilty to the charges. On July 27, 2001, Hays changed his plea to guilty under § 1365(a) in the United States District Court for the Southern District of Illinois (Appendix E). Thereafter, but before sentencing, Hays hired Edward L. Dowd, Jr. as an additional lawyer (Appendix H, p. 33a). On May 17, 2002, Hays was sentenced to 51 months in prison for the following offenses:

Count 1: Tampering With Consumer Products, § 1365(a); and

Count 2: Possession Of A Controlled Substance By Misrepresentation, Fraud, Forgery, Deception Or Subterfuge, 21 U.S.C. § 843 (Supp. 2002).

One year after he was sentenced, Hays filed a timely *pro se* Motion to Vacate Conviction Under § 2255, on the ground of ineffective assistance of counsel (Appendix H, pp. 29a-34a). Hays prayed in his § 2255 Motion that his conviction be vacated, his plea be withdrawn, and he be allowed a trial on both counts. Hays swore under oath that he was "actually innocent;" Hays swore that his plea was neither intelligent nor voluntary; Hays swore that his lawyer had induced his plea by threats and/or misrepresentation (Appendix H, pp. 31a-34a). Hays swore that he had had no "criminal intent" under Count 2 (Appendix H, p. 34a); although, he acknowledged (as he always had, going back to his arrest by the DEA), that he had stolen Oxycontin from his patients who had no medical need for the drug in order to satisfy his involuntary addiction (Appendix H, p. 31a).

One of the elements of § 1365(a) is that the accused tamper[1] with a consumer product so that such conduct "affects interstate or foreign commerce." 18 U.S.C. § 1365(a). Before Hays was sentenced, the only reference in the record to the "affects interstate commerce" element took place during the Change of Plea Hearing, where the District Court asked the prosecutor:

> "Where do they manufacture Oxycontin?" The prosecutor answered: "Oh, I apologize, Your

[1] The Seventh Circuit found: "Hays does not deny that he tampered with Oxycontin." *Hays*, 397 F.3d at 568. Hays, however, denied that he had tampered with the drug. See Appendix G, which is an excerpt from the Government's Response to Hays' § 2255 Motion, dated March 4, 2004: "Petitioner [Hays] claims that his conduct did not amount to tampering." Hays had also denied throughout that his conduct violated the other elements of § 1365. Specifically, he denied that he acted with a "reckless disregard" for, or an "extreme indifference" to, the safety of another.

> Honor. Oxycontin is not manufactured within the state of Illinois. It is manufactured in, by Perdue [phonetic] is the name of the company, and it's in Minnesota."

Appendix E, p. 20a.

Neither Mr. Green nor Mr. Dowd, Dr Hays' lawyers during the plea and sentencing, raised the case of *Levine*, 41 F.3d at 607, to the District Court. Nor did Messrs. Green and Dowd bring this case, or the law of this case, to the attention of Dr. Hays.

The District Court denied Dr. Hays' § 2255 motion, but granted a Certificate of Appealability. The Seventh Circuit affirmed the denial in *Hays v. U.S*, 397 F.3d at 564 (7th Cir. 2005). The Seventh Circuit denied the Petition for Rehearing on April 6, 2005. This Petition for a Writ of Certiorari followed.

## REASONS FOR GRANTING THE PETITION

In the opinion below, the U.S. Court of Appeals for the Seventh Circuit entered a decision in conflict with the decision of the U.S. Court of Appeals for the Tenth Circuit on an important matter. Specifically, the Seventh Circuit in *Hays v. U.S.*, 397 F.3d at 564, decided that the conduct Petitioner Jon Riley Hays was convicted of was a violation of § 1365, whereas *U.S. v. Levine*, 41 F.3d at 607, held that such conduct was not a crime. Resolution of this conflict is paramount because in the Seventh Circuit, citizens, like Petitioner Jon Riley Hays, are receiving long prison sentences for committing acts which are non-existent crimes in the Tenth Circuit.

## I. A CONFLICT EXISTS IN THE CIRCUIT COURTS OF APPEAL IN THE CONSTRUCTION OF 18 U.S.C. § 1365(a) AS TO WHETHER THE "AFFECTS INTERSTATE COMMERCE" ELEMENT OF THE CRIME REQUIRES PROOF THAT THE CONDUCT OF THE ACCUSED HAS HAD AN EFFECT ON INTERSTATE COMMERCE EITHER AT THE TIME OF THE ALLEGED TAMPERING, OR AFTER, BUT NOT BEFORE.

The Tenth Circuit construed the "affects interstate or foreign commerce" element of § 1365 correctly. In *Levine*, 41 F.3d at 613, the Court held: "the effects on interstate commerce [must] occur either at the time of or after the tampering, not before." The *Levine* Court then analyzed the statute at some length, and held:

> The only reasonable interpretation we see in light of both the language of the statute and the legislative history is that the effect on interstate commerce must occur at or after the tainting.
>
> Moreover, the interstate commerce requirement is phrased in the present tense: 'if such consumer product *affects* interstate commerce.' (Citation) If Congress had meant to include pre-tainting events, it would have made more sense to use the past or past perfect tenses (i.e. 'affected' or 'had affected' interstate commerce). The use of these past tenses logically would have included events prior to the time of tainting. The use of the present tense, on the other hand, further supports our holding that the consumer product must affect interstate commerce at or after the tainting.

> 'Affects' suggests that the consumer product must have either a present effect or an effect in the future, and appears to exclude pre-tainting events.

*Levine*, 41 F.3d at 614.

Hays prescribed Oxycontin to patients who had no medical need for the drug so that he could steal it for his own use to satisfy his own involuntary addiction.[2] The *only evidence* on the interstate commerce element before the District Court, at the time Hays was convicted of violating § 1365(a), was that Oxycontin had been manufactured in Minnesota. However, under the *Levine* rule, the place of manufacture of the consumer product has nothing to do with a § 1365 violation. Under the *Levine* rule, whether the consumer product was in interstate commerce *before* the alleged tampering is irrelevant to an offense under § 1365.

The Seventh Circuit recited a number of facts in the *Hays* opinion which had no basis in the evidence or in the record. *See Hays*, 397 F.3d at 568. The Seventh Circuit said that "Hays does not deny he tampered with Oxycontin." *Id.* However, it has already been shown that Hays did, in fact, deny it (Appendix G, pp. 26a-28a). Furthermore, the Seventh

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[2] There was a dispute at the Change of Plea Hearing about whether Hays had ever injected a patient with Oxycontin. Hays denied it, he told the Court: "dissolving a small portion of the coating (of lidocaine) or giving somebody a lidocaine injection would be a near negligible risk, whereas crumbling something and doing it, I would never have done that." See Appendix E, p. 21a. The District Court found as a fact at the Sentencing that Hays had *not* injected Oxycontin: "I'm uncertain enough about the injection of Oxycontin that I would not rely on that assertion of fact." See Appendix F, p. 24a.

Circuit said that Hays "denied patients who were dying of cancer their pain medication." *Hays,* 397 F.3d at 568. Yet the undisputed evidence was exactly the opposite. According to the comments of the prosecutor to the District Court during the Change of Plea, "[An] individual did have cancer, and apparently *the drug was prescribed appropriately.* In fact the patient died a few days later, although *there is no indication it had anything to do with the Oxycontin." (Appendix* E, pp. 21a-22a) (emphasis added). The prosecutor also told the District Court at Sentencing, "The Government does not and has not tendered any evidence that the doctor's conduct in fact caused any harm." (Appendix F, p. 25a).

Besides reciting unsupported facts, the Seventh Circuit also erroneously held: "Because of the prescriptions he wrote to facilitate his use of the drug, pharmacies in Illinois were required to order more Oxycontin from Minnesota to replenish their supplies. Under the supply and demand theory, this is enough to support a violation of § 1365(a)." *Hays*, 397 F.3d at 568. There was no evidence, however, that pharmacies in Illinois had to replenish their supplies. In fact, the evidence was precisely the opposite. The patients from whom Hays stole the drug did not need it in the first place. It was unnecessary for these patients to be treated with Oxycontin; thus, there was no need for any pharmacies to have to "replenish their supplies." Certainly, there is not one shred of evidence in the record of any Illinois pharmacy having to replenish Oxycontin. It is not necessary, however, to sort through these factual discrepancies because all Hays is asking for is the right to a trial. If government prosecutors can, in fact, prove the interstate commerce element, let them do so at a trial.

Hays has pointed to a number of errors in the Seventh Circuit opinion, but the crux of this case is the conflict between the Tenth Circuit's *Levine* case and the Seventh Circuit's opinion at bar: "We decline to follow *Levine*." *Hays*, 397 F.3d at 567. The question of which Circuit is correct is the first issue presented in this Petition; and of course, Dr. Hays claims that *Levine* is the correct interpretation of § 1365. Petitioner Hays asserts that resolution of this conflict is a matter of extreme importance. People whose alleged "tampering" with a consumer product that has no present or future effect on interstate commerce have nothing to worry about (at least from federal prosecutors), if they live in Colorado, Utah, Wyoming, Kansas, Oklahoma, or New Mexico. However, people who engage in the exact same conduct are going to prison for long sentences if they live in Illinois, Wisconsin, or Indiana.

## II. PETITIONER'S PLEA OF GUILTY AND RESULTING CONVICTION WERE THE RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE PLEA WAS NOT INTELLIGENT OR WAS NOT VOLUNTARY.

It is undisputed that Hays' counsel, Messrs. Green and Dowd, failed to raise *Levine* to either the District Court or to Hays. The District Court denied Hays' motions in the § 2255 proceeding to conduct discovery or to hold an evidentiary hearing. As a result, Hays was unable to confront Messrs. Green and Dowd with respect to their failure. Moreover, it is also clear that neither Green nor Dowd did *any* research under § 1365. If they had, *Levine* would have shown that their client had been induced to plead to a non-existent offense.

The facts here are similar to those presented in *Bousley v. U.S.*, 523 U.S. 614 (1998). Bousley had pleaded to violating 18 U.S.C. § 924(c) (Supp. 2002). He later filed and lost a § 2255 motion. Thereafter, he sought a Writ of Habeas Corpus, which he lost in the federal district court. While Bousley appealed that denial, this Court decided *Bailey v. U.S.*, 516 U.S. 137 (1995). *Bailey* held that mere possession of a firearm did not violate § 924(c), which was also Bousley's contention. Chief Justice Rehnquist wrote in *Bousley*:

> In other words, petitioner contends that the record reveals that neither he, nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged. Were this contention proved, petitioner's plea would be, contrary to the view expressed by the Court of Appeals, constitutionally invalid.

*Bousley*, 523 U.S. at 618-619. Bousley's plea was held to be not "intelligent." Specifically, Bousley did not receive "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." *Id.* at 618.

*Bousley* is like the case at hand. Hays did not receive notice of the "true nature" of the elements of a § 1365(a) offense. If he had had competent legal counsel, Hays would have known that he was pleading to a non-existent crime. Neither Hays, nor his counsel, nor the court correctly understood the essential element of the crime with which Hays was charged. Clearly, Hays' plea was "constitutionally invalid." Stealing Oxycontin from patients who had no medical need for the drug could never have a present or future effect on interstate commerce. These patients did not need

to replenish Oxycontin because they had no need for it in the first place (Hays did prescribe and administer Oxycontin to at least one patient who needed it, but there was no evidence that he stole the drug from that patient).

The point to be made in this Petition, is that Hays' counsel were constitutionally ineffective under *Strickland v. Washington,* 466 U.S. 668 (1984). Their failure to raise *Levine* to the District Court or to Hays, resulted in their client's imprisonment for a non-existent offense under Count 1.

With respect to Count 2, Hays prays his conviction be vacated, his plea be withdrawn, and he be allowed a trial.

Hays was involuntarily addicted to Oxycontin. He did not have the requisite *mens rea* or intent. The evidence at the Change of Plea and at the Sentencing Hearing was undisputed that Hays had lived an exemplary life before he had become involuntarily addicted to Oxycontin. At the very least, Dr. Hays should be allowed to present this defense at a trial. Counsel for Dr. Hays not only failed to explain this "lack of intent defense" to Hays, it is undisputed that Attorney Green himself threatened Hays[3] (Appendix H, pp. 31a-32a). The Seventh Circuit has recognized defense counsel's duty to provide "adequate information to a possible defense of lack of intent." *U.S. v. Frye,* 738 F.2d 196 (7th Cir. 1984).

[3] The Seventh Circuit recited that: "Hays contends that his plea was not voluntary because the government threatened" him. This was not Hays' contention, however. Hays contended that *his own lawyer* had threatened him. Hays' own lawyer misrepresented that threats had been conveyed by the prosecutor (among other misrepresentations). This contention by Hays was made under oath (see Appendix H) and is uncontradicted in the evidence.

The performance of Hays' counsel was deficient in that both of his counsel failed to advise Hays of his defenses to Count 2; in addition, lawyer Green's threats and misrepresentations (which are undisputed in the record), should invalidate the plea on both counts.

The Seventh Circuit in *Hays* said that a § 2255 motion "is reserved for extraordinary situations." *Hays*, 397 F.3d at 566. However in *Massaro v. U.S.*, 538 U.S. 500, 504 (2003), this Court held: "We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under section 2255, whether or not petitioner could have raised the claim on direct appeal." The *Massaro* Court explained that the § 2255 Motion is actually preferable to the direct appeal, as a means by which to litigate ineffective-assistance-of-counsel issues.

Resolution of the conflict in decisions between the Tenth and Seventh Circuits informs the question of whether Hays' plea was "intelligent." There can be no doubt the Tenth Circuit's *Levine* case was correct. Hays' counsel were constitutionally deficient in their failure to raise *Levine*; as a result, that deficiency caused Hays' imprisonment. It is also undisputed in the evidence that Hays' lawyer, Mr. Green, threatened and misrepresented facts to Hays. Consequently, Hays plead guilty to crimes when he was actually innocent. Clearly, Hays' plea was not "voluntary." This conduct by Mr. Green was also constitutionally deficient; as a result, that deficiency also caused Hays' imprisonment.

According to *Strickland*, "The defendant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

There can be no doubt, but for counsel's threats and misrepresentations, the outcome of the proceeding would have been different. Hays would never have pleaded guilty to crimes of which he was actually innocent.

## CONCLUSION

Petitioner, Jon Riley Hays, prays that the Court will grant the Writ of Certiorari and resolve the conflict between the Tenth and Seventh Circuits. Petitioner Hays also prays that the Court will reverse the Seventh Circuit in the case at bar. Finally, Petitioner Hays prays that the Court will hold he was denied effective assistance of counsel, his plea was neither intelligent nor voluntary; he was prejudiced by the ineffective assistance, his conviction be vacated, his plea be withdrawn, and he be granted the right to a trial on both counts.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED FEBRUARY 10, 2005**

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

No. 04-2456

JON RILEY HAYS,

*Petitioner-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

Argued December 6, 2004—Decided February 10, 2005

Before Easterbrook, Kanne, and Evans, *Circuit Judges.*

Kanne, *Circuit Judge.* Jon Riley Hays, a licensed medical doctor, pled guilty to two charges stemming from his illegal use of OxyContin. Count I charged Hays with tampering with a consumer product, and Count II charged him with possession of a controlled substance by misrepresentation or fraud. Hays was senteneed to fifty-one months in prison for Count I and a concurrent sentence of forty-eight months for Count II. Hays now asks for collateral relief under 28 U.S.C. § 2255, claiming that his attorneys provided ineffective assistance and that his plea was not

voluntary because he did not understand the nature of the charges against him. The district court denied his motion. For the reasons set forth in this opinion, we affirm.

## I. History

Hays practiced medicine in several towns in rural Illinois. In early 2000, he was involved in a car accident which caused injury to his back. He began taking OxyContin to relieve his pain and became addicted to the drug. Although the recommended oral dosage was 20 to 40 mg per day, Hays would often inject approximately 300 mg of the drug in a day.

In order to gain access to such a large amount of OxyContin, Hays prescribed it to his patients and then stole the drug from them during house calls. How he did this is in some dispute. The state argues that he crushed the OxyContin tablets, dissolved the particles in a syringe, and injected the patient with a portion of the dissolved drug. He then left with a syringe filled with the drug and some of the remaining tablets for his own use. Hays denies that he injected patients with the dissolved OxyContin, stating that he thought "crushing something . . . would be dangerous." He claims that he occasionally broke pills in half or prescribed more of the drug than the patient needed so that he could take some of the pills for himself. He also injected some patients with a placebo (i.e., lidocaine or saline) so that he could inject the entire dosage of OxyContin into himself.

*Appendix A*

Under Count I of the indictment, Hays was charged with tampering with a consumer product:

> Whoever, with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product that affects interstate or foreign commerce . . . [shall] be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 1365(a), (a)(4). Count II alleged that Hays had "acquire[d] or obtain[ed] possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." 21 U.S.C. § 843(a)(3). Hays pled guilty to these charges but now seeks relief from his fifty-one month sentence under 28 U.S.C. § 2255.

**II. Analysis**

Relief under § 2255 "is reserved for extraordinary situations." *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir. 1996) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993)). The court may vacate or correct Hays's sentence if he can "show that the district court sentenced him in violation of the Constitution or laws of the United States or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack." *Prewitt*, 83 F.3d at 816 (citing *Theodorou v. United States*, 887 F.2d 1336, 1338 n. 2 (7th Cir. 1989)). We review the district court's denial of the § 2255 motion *de novo*. *McCleese v. United States*, 75 F.3d 1174, 1177 (7th Cir. 1996).

*Appendix A*

In order for a plea to be valid, it must be made voluntarily, knowingly, and intelligently. *See United States v. Gilliam*, 255 F.3d 428, 432-33 (7th Cir. 2001) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). Hays now argues that his plea was not intelligent or voluntary and that his attorney provided ineffective assistance.

*A. Hays's Conduct Affected Interstate Commerce*

A guilty plea is not made intelligently unless the defendant receives "real notice of the true nature of the charge against him. . . ." *Smith v. O'Grady*, 312 U.S. 329, 334 (1941). Hays argues that because "neither [Hays], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged," the guilty plea is not valid. *See Bousley v. United States*, 523 U.S. 614, 618-19 (1998). The misunderstanding that Hays alleges relates to the interstate commerce element of 18 U.S.C. § 1365(a).

Hays relies on a Tenth Circuit decision as support for his argument that neither his counsel nor the court truly understood what was necessary for proving the interstate commerce element of § 1365(a). In *United States v. Levine*, the court held that "the effect on interstate commerce must occur at or after the tainting." 41 F.3d 607, 614 (10th Cir. 1994). The court noted that "the interstate commerce requirement is phrased in the present tense." *Id.* Therefore, it should be read to penalize one who tampers with a product that "*affects* interstate commerce." This "suggests that the consumer product must have either a present effect or an effect in the future, and appears to exclude pre-tainting events." *Id.*

*Appendix A*

At the change of plea hearing, the court established that OxyContin is manufactured in Minnesota and that the tampering occurred in Illinois. This was taken as adequate evidence of an effect on interstate commerce. Hays believes that the question should have been whether the drug had any effect on interstate commerce after Hays gained access to the OxyContin at the homes of his patients. He argues that his lawyers should have been aware of *Levine* and should have advised him not to plead guilty.

Even if it is on point, a Tenth Circuit decision is not binding on courts in other circuits. *See United States v. Glaser*, 14 F.3d 1213, 1216 (7th Cir. 1994). We decline to follow *Levine*. We find the Eighth Circuit's decision in *United States v. Moyer* to be persuasive. 182 F.3d 1018 (8th Cir. 1999). In that case, the court reasoned that when a nurse stole morphine, she depleted the supply of morphine and caused more to be ordered. The morphine that was ordered traveled in interstate commerce. Under this reasoning, when a drug is manufactured outside the state, the law of supply and demand can support a violation of § 1365(a). *See Moyer*, 182 F.3d at 1021.

Also instructive was our decision in *United States v. Cunningham*, 103 F.3d 553 (7th Cir. 1996). In that case, a nurse stole Demerol from a locked cabinet and replaced the drug with saline. This tampering arguably occurred after the drug had traveled in interstate commerce. The court did not discuss the interstate commerce element in upholding Cunningham's conviction under § 1365, but the case can be read to state implicitly that the timing of the tampering is irrelevant.

Hays does not deny that he tampered with OxyContin. By breaking pills, injecting saline, and stealing up to half of the drugs he prescribed, he denied patients who were dying of cancer their pain medication. Because of the prescriptions he wrote to facilitate his use of the drug, pharmacies in Illinois were required to order more OxyContin from Minnesota to replenish their supplies. Under the supply and demand theory, this is enough to support a violation of § 1365(a).

The Supreme Court has indicated that the phrase "affecting commerce" usually "signals Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273 (1995). We find that a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce. Therefore, Hays did have real notice of the charges against him and his guilty plea was made intelligently.

*B. Ineffective Assistance*

Hays claims that his counsel failed to adequately advise him of the elements of the tampering charge and that he was provided with false information about his likely sentence. "To demonstrate prejudice arising from a guilty plea allegedly rendered involuntary by counsel's deficient performance, a petitioner must establish that counsel's performance was objectively unreasonable and that, but for counsel's erroneous advice, he would not have pleaded guilty." *Bridgeman v. United States*, 229 F.3d 589, 592 (7th Cir. 2000) (citation omitted). This test is "highly deferential" to counsel and presumes reasonable judgment and effective trial strategy.

*Appendix A*

*See United States v. Scanga*, 225 F.3d 780, 783-84 (7th Cir. 2000).

Hays argues that he is actually innocent of the tampering charge and that he would not have pled guilty to it if he had understood the elements. However, because we decline to accept the rationale of *Levine*, we find that Hays's counsel was objectively reasonable in allowing Hays to plead guilty.

Hays claims his attorney misrepresented what his sentence would be if he did not plead guilty. Specifically, Hays states that his counsel told him that he should plead guilty because the prosecutors were personally angry with him and that they win ninety-nine percent of their cases. He says that counsel informed him that if he did not plead guilty to Count I, the prosecutors would "de-stack" the charges against him and he might have to spend ten to twenty years in prison. Hays says he was told that if he did accept the plea agreement, he would probably receive a very short sentence or possibly just probation because the prosecutors would not oppose a one-third reduction of the sentence and he would be eligible for a drug program which would further reduce his sentence.

Hays now claims that the advice given to him by counsel was unsound. He argues that ten to twenty years was not a good faith estimate of his potential sentence and that it was also unlikely that Hays would receive "little to no" prison time if he pled guilty. Counsel should have discovered that Hays was not actually eligible for the drug program because the tampering charge was classified as a violent crime by the Bureau of Prisons. Although this confusion was unfortunate,

it is not enough to prove ineffective assistance—especially when Hays's conversation with the district court is taken into consideration.

The court discussed the plea and its consequences with Hays and told him, "[Y]ou're looking at prison time in this case, not probation; and you understand that?" He responded affirmatively. Judge Herndon explained at length that the final sentencing decision would be made by the court, not by the prosecutor or the defense attorneys. He informed Hays that if he decided to impose a sentence at the high end of the guideline range—closer to sixty-three than fifty-one months—Hays would not be able to withdraw his guilty plea.

Counsel's advice to Hays was not objectively unreasonable. Had Hays gone to trial, his sentence could have been substantially higher. Because of his plea, the court granted a three-level downward departure for acceptance of responsibility under U.S.S.G. § 3E1.1(a), (b). Without this departure, Hays's sentence would have been between seventy and eighty-seven months.[1] Although it is true that counsel and the court thought that Hays would be eligible for a drug program, Judge Herndon made it clear at the hearing that neither he nor the attorneys had any control over that decision. Hays has not provided sufficient evidence to overcome the presumption that his counsel was effective.

---

1. We note in passing that *United States v. Booker*, 125 S.Ct. 738 (2005), is not implicated in this case. *See McReynolds v. United States*, No. 04-2520, 2005 WL 237642 (7th Cir. Feb. 2, 2005).

## *Appendix A*

### *C. Hays's Plea Was Voluntary*

Hays contends that his plea was not voluntary because the government threatened to add charges against him if he did not plead guilty. The court discussed this pressure with Hays and came to the conclusion that, although it was a difficult decision, Hays had weighed the benefits and decided voluntarily that pleading guilty was his best option.

The court asked Hays whether anyone attempted to put undue pressure on him to plead guilty. The following conversation then occurred:

> Hays: I certainly feel that the Government may attack me more vociferously on charges that probably have not much merit, but certainly I think that that is an action that they've not said so much that they would take, but that is certainly looming out there. It is a threat. I feel that this is something I had to accept, yes.
>
> . . . .
>
> Court: Okay. So, I guess the bottom line is nobody comes in here gladly to plead guilty. . . . So, people come to some realization at some point that given the circumstances, they, to use your word, they feel like they have to do this because of a number of things. Obviously, there is some advantage to pleading guilty in the sense of acceptance of responsibility saves a person some punishment.

> Perhaps there is some other reasons [sic] for accepting a plea; might be to avoid additional charges, or whatever the fact of life is.
>
> The real question I have to try to determine here is are you doing this of your own free will? Is this something you want to do, given the fact that you feel the constraints of the reality of the situation, but something that you really and truly want to do given everything, absent some undue arm twisting or improper sort of pressure?
>
> Hays: Yes, sir. In that instance, yes, understanding all the charges, understanding the position of the Government, the limitations available on this plea, the possible augmentation of charges or sentencing or departure downward. Taking all those things into consideration, no, sir, nobody has quote-unquote twisted my arm to make this plea. This is done of my own free will.

(App. at 22-24.)

A plea agreement is constitutionally valid if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *United States v. Kelly*, 337 F.3d 897, 904 (7th Cir. 2003) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). A trial judge has discretion to accept a guilty plea even when the defendant has declared his innocence as long as there is adequate evidence of guilt. *See Higgason v. Clark*, 984 F.2d 203, 208

(7th Cir.), *cert. denied*, 508 U.S. 977 (1993). We find that Hays's colloquy with the court, and the evidence of guilt in the record, establishes that his plea agreement was voluntary and intelligent.

## III. Conclusion

Hays pled guilty to tampering with and fraudulently possessing OxyContin. He now argues that his counsel was ineffective and that his guilty plea was involuntary. These claims have no merit. He had a difficult decision to make, and he must now live with the consequences of that decision. The denial of his § 2255 motion is Affirmed.

A true Copy:
Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

## APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED JUNE 1, 2004

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**No. 03-CV-0310-DRH**

**JON RILEY HAYS,**

**Plaintiff,**

**v.**

**UNITED STATES OF AMERICA,**

**Defendants.**

***MEMORANDUM AND ORDER***

**HERNDON, District Judge:**

Pending before the Court is Hays' motion for certificate of appealability (Doc. 26). Based on the following, the Court grants the motion.

On July 27, 2001, Jon Riley Hays plead guilty to tampering with a schedule II controlled substance, Oxycontin, in violation of **18 U.S.C. § 1365(a)(4)** (Count 1) and possession of a schedule II substance, Oxycontin, through fraud in violation of **21 U.S.C. § 843(a)(3)** (Count 2). That same day, Hays entered a plea agreement with the

Government in which he waived his right to appeal the sentence imposed and his right to challenge his sentence by way of collateral attack including a **28 U.S.C. § 2255** petition (Doc. 20). Before sentencing, attorneys Edward Dowd and Alan Dixon entered their appearance on behalf of Hays (Dots. 33 & 34). On May 17, 2002, the Court sentenced Hays to a term of fifty-one months imprisonment on Count 1 and to a term of forty-eight months imprisonment on Count 2, to run concurrently. Judgment reflecting the same was entered on May 20, 2002 (Doc. 43).

Hays did not appeal his sentence and conviction to the Seventh Circuit Court of Appeals. Instead, Hays, *pro se*, filed his Section 2255 petition with this Court on May 19, 2003 (Doc. 1). On May 19, 2004, the Court denied Hays' § 2255 relief (Doc. 24) and Judgment was entered reflecting the same (Doc. 25). On May 31, 2004, Hays filed a notice of appeal (Doc. 28 ). Additionally, Hays moved this Court to issue a certificate of appealablity (Doc. 26). Because Hays has made the required showing, the Court grants the motion.

**28 U.S.C. § 2253(c)(1)** provides that an appeal "may not be taken" from a final order in a § 2255 proceeding unless a certificate of appealability first is issued. Similarly, **FEDERAL RULE OF APPELLATE PROCEDURE 22(b)(1)** requires: "in a . . . § 2255 proceeding, the applicant cannot take an appeal unless . . . a circuit or district judge issues a certificate of appealability. . . ." **28 U.S.C. § 2253(c)(2)** clarifies that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." "Under the controlling standard, a petitioner must 'show that reasonable jurists could debate

whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further."' ***Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citations omitted).**

Hays argues that (1) he was denied his Sixth Amendment right to effective assistance of counsel; (2) that he was denied his Fifth Amendment due process right to be afforded real notice of the true nature of the charges against him, before his plea was accepted and before his judgment and conviction became final; and (3) whether or not his plea was involuntary. Based on the Tenth Circuit's ruling in ***U.S. v. Levine*, 41 F.3d 607 (10th Cir. 1994)** and the Seventh Circuit's ruling in ***U.S. v. Cunningham*, 103 F.3d 553 (7th Cir. 1996),** the Court concludes that Hays has demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." ***Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).** The Court finds that Hays' has made a substantial showing of a denial of a constitutional right. Thus, the Court **GRANTS** Hays' motion for certificate of appealablity (Doc. 26). The Court **ISSUES** Hays a certificate of appealability in this matter.

**IT IS SO ORDERED.**

Signed this 1st day of June, 2004.

/s/ David R. Herndon
**DAVID R. HERNDON**
**United States District Judge**

**APPENDIX C — JUDGMENT IN A CIVIL CASE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED MAY 19, 2004**

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS**

No. 03-0310 DRH
Criminal No. 01-30032-001 DRH

JON RILEY HAYS,

Petitioner,

vs-

UNITED STATES OF AMERICA,

Respondent.

**JUDGMENT IN A CIVIL CASE**

**DECISION BY COURT**. This action came before the Court for a ruling on the petitioner's motion to vacate, set aside, or correct the sentence pursuant to **28 U.S.C. § 2255**.

**IT IS ORDERED AND ADJUDGED** that the motion is **DENIED** and this case is **DISMISSED WITH PREJUDICE**.

*Appendix C*

**NORBERT G. JAWORSKI, CLERK**

BY: /s/ Patricia Brown
Deputy Clerk

EOD: 5/19/2004

May 19, 2004

APPROVED: /s/ David R. Herndon
U.S. DISTRICT JUDGE

**APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 6, 2005**

**UNITED STATES COURT OF APPEALS**
**For the Seventh Circuit**
**Chicago, Illinois 60604**

April 6, 2005

**Before**

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 04-2456

JON RILEY HAYS,

*Petitioner-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Respondent-Appellee.*

*Appendix D*

**ORDER**

On consideration of the petition for rehearing and petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

## APPENDIX E — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED JULY 27, 2001

## IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 01-30032-DRH
July 27, 2001

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JON RILEY HAYS,

Defendant.

## CHANGE OF PLEA

REPORT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID R. HERNDON
UNITED STATES DISTRICT JUDGE

* * *

there was a second syringe that he used. He states that he would put the first syringe that he crushed the Oxycontin up with into, he put that into his pocket, remove a different syringe, and then would inject the person with a different syringe.

*Appendix E*

THE COURT: Where do these patients live?

MR. KILLIAN: Actually, this patient, the patient that we have, the stipulation is in reference to, they are all in the southern portion of the state.

MR. GREEN: That's correct, Your Honor.

THE COURT: Where do they manufacture Oxycontin?

MR. KILLIAN: Oh, I apologize, Your Honor. Oxycontin is not manufactured within the State of Illinois. It is manufactured in, by Perdue (phonetic) is the name of the company, and it's in Minnesota.

THE COURT: Okay. As to Count 2?

MR. KILLIAN: I'm sorry, Your Honor, as to Count 2, once again, the defendant on September 20th wrote a prescription for forty tablets of Oxycontin to a patient, traveled to the patient's house to administer the injection. Upon arriving at the residence, Dr. Hays learned that the Oxycontin had not been obtained yet by the patient. He, himself, went to the pharmacy and picked up the substance. When he went back to the residence of the individual, he . . .

* * *

MR. KILLIAN: Your Honor, with regard to -- there is approximately twelve incidents where this occurred. The one that we utilized -- we didn't use names or locations for the persons, but that individual did have cancer, and apparently

the drug was prescribed appropriately. In fact, the patient died a few days later, although there is no indication it had anything to do with the Oxycontin.

THE COURT: I understand.

MR. GREEN: As I might say, in that instance, Your Honor, from what I understand, the doctor, in addition to what counsel said as far as these charges on that particular date, did seek to give the patient some comfort and care by his being there.

THE COURT: Okay. Doctor, with respect to the facts that Mr. Killian has recited for me, or at least the version of the facts that you have asserted, which -- and I agree with him, I think there is not a material difference with respect to the elements of the case. I understand that there is a distinct factual difference, but in terms of its effect on whether or not they proved the elements of the offense, I see no difference. But given your version of the facts as he recited, do you have any disagreement with the things he said?

DEFENDANT HAYS: No, sir, Your Honor. It was -- it was just important to me, because, number one, it was the facts; and number two, my opinion is, most pharmacists, other people's opinion, not that this could certainly change the case or the plea or anything, dissolving a small portion of the coating or giving somebody a lidocaine injection would be a near negligible risk, whereas crushing something and doing it, I would have never done that. That would be dangerous, I do think.

*Appendix E*

THE COURT: And I take it that by, Mr. Killian, by depriving these persons of the full effect of the drug for which they had been prescribed, as you mentioned, appropriately, and presumably then subjecting them to additional pain and suffering, that's where we get the bodily injury part of this?

MR. KILLIAN: That is correct, Your Honor. There is two scenarios under which we could argue this and submit it to the Court. One would be that, first of all, I give Dr. Hays some deference. He is a medical doctor, and until this morning we had no indication that this was going to be his defense. So, we discussed it among ourselves with regard to the agents. There are two theories that we were looking at with regard to that, the first being that the Oxycontin had been crushed up and injected, which was consistent with our evidence. Even if the doctor was now saying that it was only a portion of the Oxycontin, it's still, because of the nature of some of the ailments that the . . .

* * * *

## APPENDIX F — EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS DATED MAY 17, 2002

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

No. 01-30032-DRH
May 17, 2002

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JON RILEY HAYS,

Defendant.

**SENTENCING HEARING**

REPORT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID R. HERNDON
UNITED STATES DISTRICT JUDGE

* * *

this case, and what I've suggested be addressed by your counsel, is the issue of your breaking up the pills and giving them to the clients or the patient, because we know there is no dispute in that, correct?

DEFENDANT HAYS: No, sir. Or really, I -- on a couple of occasions, I did break a pill in half and give that to the patient.

THE COURT: And so let me say again that as far as -- I'm uncertain enough about the injection of the Oxycontin that I would not rely on that assertion of fact in determining your sentence.

Now, having said that, is that sufficient for the record or do we need any further?

DEFENDANT HAYS: Yes, sir, I understand.

THE COURT: Anything else?

DEFENDANT HAYS: No, sir.

THE COURT: Okay, great.

Now, with respect to the additions that Mr. Green suggested, I got some revisions. Were those addressed in the revisions adequately, Mr. Green, or Mr. Dowd, either one, as far as you know they were?

MR. GREEN: Yes.

THE COURT: I didn't carefully check the revisions to make sure but --

MR. DOWD: Really, with those two facts that . . .

* * *

would illustrate a concern by this doctor about Oxycontin and breaking Oxycontin in general, and more importantly, it shows once again a step that he's taking to try to minimize for the Court his culpability in this matter, and I -- I'll leave it to the Court on its own recollection and draw from it what inference that it would like with regard to that.

So, in the final analysis, I don't believe that the Guideline itself that calls for 51 months for tampering is out of line. This defendant went about a course of conduct that potentially -- and I will read from the Presentence Report, and I know now that the Physicians Desk Reference that this doctor should have been using from 1991 through 2001, clearly the time frame alleged within the conduct, the Desk Reference states "Tablets are to be swallowed whole and are not to be broken, chewed, or crushed. Taking broken, chewed, or crushed Oxycontin tablets could lead to the rapid release and absorption of a potentially toxic dose of oxycontin."

Clearly what this defendant was doing, from a whole slew of circumstances, was dangerous for this doctor's patients. Now, the Government does not and has not tendered any evidence that the doctor's conduct, in fact, caused any harm. There was some delay in treatment, but that's about it. With reference to an argument by Mr. Dowd and mentioning that a potential for a downward departure, the Government . . .

* * * *

## APPENDIX G — EXCERPTS FROM GOVERNMENT'S RESPONSE TO PETITIONER'S AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS DATED MARCH 7, 2004

**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS**

Civil No. 03-CV-310-DRH

Criminal No. 01-CR-30032-001-DRH

JON RILEY HAYS,

Petitioner/Defendant.

vs.

UNITED STATES OF AMERICA,

Respondent/Plaintiff.

**GOVERNMENT'S RESPONSE TO PETITIONER'S AMENDED MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE**

Respondent/Plaintiff United States of America, by and through its attorneys, Ronald J. Tenpas, United States Attorney for the Southern District of Illinois, and Ranley R. Killian, Assistant United States Attorney, respectfully files this response to Petitioner John Riley Hays's amended motion made pursuant to 28 U.S.C. § 2255 (Doc. No. 16).

*Appendix G*

## I. INTRODUCTION

Petitioner seeks relief from this Court asserting that attorneys Edward L. Dowd, Alan J. Dixon and Terry M. Green were constitutionally ineffective in their representation of Petitioner. Petitioner asserts that if the three attorneys had looked at the statute and law they would have realized that Petitioner had not violated Federal law. The Petitioner alleges that his conduct did not amount to tampering and that the Court lacked jurisdiction because there was no post-tampering effect on interstate commerce. These claims fail on their merits, and Petitioner waived his right to bring this § 2255 action.

* * *

2000), *cert. denied*, 531 U.S. 1097 (2001). With respect to the prejudice prong the defendant has to establish that his plea of guilty would not have been entered had it not been for the inaccurate advice. *Hill v. Lockhart*, 474 U.S. 52, 56-60 (1985); *Wanateee v. Ault*, 259 F.3d 700, 703-04 (7th Cir. 2001).

Although Petitioner claims that all three of his plea-and-sentencing counsel failed to crack a book, the attorneys clearly had a keen understanding of the law surrounding the proof of a post-tampering effect on interstate commerce. The decision not to put the government to the test at trial of proving the ordering of additional quantities of Oxycontin seems one that falls squarely in the day to day decisions that befall litigators and well outside of constitutionally defective representation.

*Appendix G*

The Oxycontin was manufactured in Minnesota, the Petitioner stole Oxycontin from his patients and over-prescribed Oxycontin. As in *Moyer*, there can be little doubt that this would have an effect on interstate commerce. The decision by three exceptionally qualified litigators not to role the dice at trial was not ineffective and was instead reasonable and sound decision making.

## III. TAMPERING

Petitioner claims that his conduct did not amount to tampering. This argument totally lacks merit and contains no support in fact or law. As the court is aware, and the transcripts bear out, the Petitioners recall of his criminal conduct varied. The government during discovery shared evidence with Attorney Green that indicated the Petitioner had in fact given injections of Oxycontin to patients. At the plea, when the Petitioner elected to claim that he had not injected anyone with Oxycontin, the government was unconcerned because the injection of the drug itself was not critical to the proof necessary for the crime. As the government was aware then, and as counsel representing the Petitioner were also aware, the critical component for the charge was always present. The . . .

* * * *

# APPENDIX H — PETITION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY FILED MAY 19, 2003

AO 243 (Rev. 2/95) **PETITION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY**

FILED
MAY 19 2003
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS OFFICE

| UNITED STATES DISTRICT COURT | District 7th | |
|---|---|---|
| Name of Movant JON RILEY HAYS | Prisoner No. 05285-025 | Case No. 01-30032-DRH |
| Place of Confinement MARION Federal PRISON CAMP | | 03-310-DRH |

UNITED STATES OF AMERICA v. JON RILEY HAYS
(name under which convicted)

**MOTION**

1. Name and location of court which entered the judgment of conviction under attack US district COURT for the Southern District of Illinois - EAST St. LOUIS

2. Date of judgment of conviction MAY 17TH 2002

3. Length of sentence 51 MONTHS

4. Nature of offense involved (all counts)
COUNT I - TAMPERING
COUNT 2 - Obtaining Controlled Substance by Fraud

5. What was your plea? (Check one)
(a) Not guilty ☐
(b) Guilty ☒
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
(a) Jury ☐
(b) Judge only ☐

7. Did you testify at the trial?
Yes ☐ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☐ No ☐

*Appendix H*

GROUND ONE - SUPPORTING FACTS

I am actually innocent of the crime of Tampering with a Consumer Product. I never "acted with reckless disregard to the risk that another person would be placed in danger of death or bodily injury." None of my actions were committed "under circumstances manifesth ektreme indifference to such risk." My counsel at the time of my plea, Terry M. Green, denied me effective assisstante, and his misconduct caused me to plead guilty to a crime I did not commit.

When the FBI/DEA arrested me, I told them everything: basically that I had become addicted to Oxycontin involuntarily and that this addiction caused me to obtain Oxycontin improperly to use myself. But I never prescribed Oxycontin to another person to be used improperly and I never treated another person with Oxycontin with the purpose of putting that person at risk of death or bodily injury.

My counsel before my plea, Terry M. Green, convinced me to plead guilty to a crime I did not commit — That being Tampering with a Consumer Product. I am not a lawyer and Mr. Green misrepresented numerous material facts and principals of law to me, among which were:

1). That the Federal Prosecutors were personally mad at me and because of that, I had to plead guilty since they won more than 99% of their cases.

*Appendix H*

2). That even though I was innocent of Tampering, I had to plead guilty because if I did not do so, the Prosecutors would "de-stack" the charges on Counts I and 2, and I would get 10-20 years in prison.

3). That if I were to plead guilty, I would likely get little or no prison time, because I would get one-third off the sentence (the Prosecutors would not oppose this) and I would get time off for the Drug Progra and that Mr. Green would even argue for probation.

4). That the offer was only open for 48 hours and that if I did not agree to the plea (and plead guilty to Tampering, even though I was innocent) I would get 10-20 years, as opposed to little or no prison time.

These facts, as I've alleged them, are supported by the July 27th, 2001 transcript. See page 15, where the court told me about the sentence I faced, I said that:

"I understand there is a matrix in which you look up the level of offense versus other factors on a mitigating axis, and you come up with a calculation that derives an approximate range of sentencing. Is the Court bound, sir, to stay within that range of sentencing?

When Judge Herndon replied "Great Question" I was relieved at the time, because I thought

*Appendix H*

that Mr. Green's representation to me — that I would get little or no prison time — was validated by the Court's explanation. I misunderstood Judge Herdon's explanation. I am not criticizing the Judge. I was scared and disoriented at the time, and I thought the Judge was telling me that he would be bound by "factors on a Mitigating axis" to reduce my sentence.

As to the ineffective assistance of counsel inducing me to plead guilty to a crime I did not ~~commit~~, see page 22, especially lines 17 & 18: "It is a threat. I feel this is something I had to accept, yes."

As to my actual innocence, I tried to assert that (my acutual innocence) even as I was pleading guilty. See pages 27 - 28. When the Judge read me the "elements" of Count 1 and asked me whether the Government would be able to prove these things, I replied:

> "Calls for a little speculation on my part. No, not all of these charges are certainly — do I think that are true of me."

At a hearing, and hopefully at a trial, I would prove that in fact I am not guilty. At a hearing, I can prove that I was induced to plead guilty to a crime I did not commit, because of ineffective assistance of counsel.

Even when I got the Dowd law firm,

*Appendix H*

they told me that the damage had all ready been done, and that I had to live with the guilty plea, but that retired Senator Alan Dixon would speak for me at the sentencing hearing.

I respectfully request an evidentuary hearing during which I will prove that I am actualty innocent, and that I was induced to plead guilty to a crime I did not commit. I ask the Court to vacate and set aside my judgement of conviction and sentence on Count 1 and allow me a trial.

GROUND TWO: Denial of Effective Assistance of Counsel on Court 2.

Supporting Facts — My motion with respect to Count 2 is on technical grounds. It is true that I improperly obtained Oxycontin improperly to satisfy my involuntary addiction. However, I did not have the "Criminal intent" required under the law. My counsel never told me that I had a defense of actual innocence on Count 2, that could prove to a jury that I lacked the "mens rea" on Count 2. I ask the Court to grant me the evidentuary hearing on this point, at which I will prove that I should have my judgement of conviction and sentence vacated and set aside, and that I be allowed a trial.

Supreme Court, U.S.
FILED
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No. 05-54

# In the Supreme Court of the United States

JON RILEY HAYS, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Petitioner pleaded guilty to tampering with a consumer product, in violation of 18 U.S.C. 1365(a)(4), and obtaining a controlled substance by fraud, in violation of 21 U.S.C. 843(a)(3). The question is whether petitioner's counsel provided constitutionally ineffective assistance by failing to advise petitioner that the government could not prove the jurisdictional element of the tampering charge; failing to advise petitioner that he could assert a defense of involuntary drug addiction to the Section 843(a)(3) charge; and forcing petitioner to plead guilty by threats and misrepresentations.

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# In the Supreme Court of the United States

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UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 397 F.3d 564. The memorandum and order of the district court (Pet. App. 12a-14a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 10, 2005. A petition for rehearing was denied on April 6, 2005 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on July 5, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After entering a guilty plea in the United States District Court for the Southern District of Illinois, petitioner was convicted of tampering with a consumer

product, in violation of 18 U.S.C. 1365(a)(4), and obtaining a controlled substance by fraud, in violation of 21 U.S.C. 843(a)(3). He was sentenced to 51 months of imprisonment. Petitioner did not take a direct appeal. Thereafter, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. The district court denied that motion, Pet. App. 15a-16a, and the court of appeals affirmed, *id.* at 1a-11a.

1. Petitioner was a licensed physician who practiced medicine in Illinois. After he injured his back in a car accident, petitioner took OxyContin to relieve his pain and became addicted to the drug. Although the recommended oral dosage was 20 to 40 milligrams per day, petitioner would often inject himself daily with approximately 300 milligrams of the drug. Pet. App. 2a, 5a.

In order to obtain such a large quantity of OxyContin, petitioner prescribed it to his patients and then stole it from them during house calls. The government argued that petitioner crushed the OxyContin, dissolved the particles in a syringe, injected patients with only a portion of the dissolved drug, and retained for his own use both the syringe filled with the drug and some of the remaining tablets. Petitioner denied that he injected patients with the dissolved OxyContin, stating that he thought "crushing something . . . would be dangerous." Pet. App. 2a. Instead, petitioner claimed that he broke pills in half or prescribed more of the drug than the patient needed so that he could take some of the pills for himself. Petitioner also admitted that he injected some patients with a placebo so that he could inject the entire dose of OxyContin into himself. *Ibid.*

2. Petitioner was charged with tampering with a consumer product in violation of 18 U.S.C. 1365(a), which prohibits "tamper[ing] with any consumer product that

affects interstate or foreign commerce" with "reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk." He was also charged, in a separate count, with violating 21 U.S.C. 843(a)(3), which makes it a crime "knowingly and intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge."

3. Petitioner pleaded guilty to both charges pursuant to a plea agreement. See Pet. App. 1a. Under that agreement, the government promised, in return for petitioner's guilty plea and cooperation, not to prosecute petitioner in the Southern District of Illinois for any other offense then known to the government or to become known to the government through petitioner's cooperation (Pet. C.A. App. C at 2), to recommend a sentence at the low end of the applicable range under the Sentencing Guidelines (*id.* at 6), and to recommend a three-level downward adjustment under Sentencing Guidelines § 3E1.1 for acceptance of responsibility (*id.* at 7).

At the subsequent change-of-plea proceeding, the district court ascertained that OxyContin is manufactured out of state, and therefore affects interstate commerce. Pet. C.A. App. A at 32; Pet. App. 20a. The court informed petitioner that if he pleaded guilty, he would be sentenced to prison, the sentence could be at the top of the applicable sentencing range of 51-63 months of imprisonment, and neither the court nor the attorneys could control the decision whether to place him in a drug program. *Id.* at 8a.

The court also asked petitioner whether defense counsel, the prosecutor, or anyone else had attempted

"to force" him or to "put undue pressure" on him to plead guilty. Petitioner responded, "[c]ertainly not my counsels, Judge." Pet. C.A. App. A at 22. He went on to state: "I certainly feel that the Government may attack me more vociferously on charges that probably have not much merit, but certainly I think that that is an action that they've not said so much that they would take, but that is certainly looming out there. It is a threat. I feel that this is something I had to accept, yes." *Ibid.*; Pet. App. 9a. In response to further inquiry by the court, petitioner stated: "[N]o, sir, nobody has quote-unquote twisted my arm to make this plea. This is done of my own free will." Pet. C.A. App. A at 24; Pet. App. 10a.

The district court accepted petitioner's plea and imposed concurrent sentences of 51 months of imprisonment for tampering with a consumer product and 48 months of imprisonment for obtaining a controlled substance by fraud. Pet. App. 1a.

4. Petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence, alleging that his attorneys had rendered ineffective assistance in advising him to plead guilty. The district court denied that motion without holding an evidentiary hearing. See Pet. App. 15a-16a.

5. On appeal, petitioner argued that his guilty plea to the product tampering charge was not knowing and intelligent, and resulted from ineffective assistance of counsel, because he was unaware at the time he entered the plea that the interstate commerce element of the offense was not satisfied. Petitioner relied on the Tenth Circuit's decision in *United States* v. *Levine*, 41 F.3d 607 (1994), which held that, in order to satisfy the interstate commerce element, "the effect on interstate commerce must occur at or after the tainting." *Id.* at 613.

The court of appeals rejected that claim. Pet. App. 4a-7a. The court explained that because of petitioner's acts, pharmacies in Illinois were required to order OxyContin from Minnesota to replenish their supplies—an effect on interstate commerce. *Id.* at 6a. The court also declined to follow *Levine*, and stated that a violation of Section 1365(a) occurs "whether the tampering takes place before, during, or after the product moves in interstate commerce." *Ibid.*; see *id.* at 5a.

The court of appeals next rejected petitioner's claim that counsel misled him about his likely sentence. Pet. App. 7a-8a. It determined that the district court had correctly informed petitioner of the consequences of his plea and that counsel's advice to petitioner was not "objectively unreasonable" because petitioner could have received a "substantially higher" sentence if he had gone to trial. *Id.* at 8a.

Finally, the court of appeals rejected petitioner's claim that his guilty plea was involuntary because the government had threatened to add charges against him if he did not plead guilty. Pet. App. 9a-11a. The court relied on petitioner's representation to the district court that his guilty plea was an act of free will and on evidence of petitioner's guilt in the record. *Id.* at 10a-11a.

## ARGUMENT

Petitioner contends (Pet. 11-15) that he received ineffective assistance of counsel. That claim lacks merit and does not warrant review.[1]

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[1] The petition does not present an issue under *United States* v. *Booker*, 125 S. Ct. 738 (2005), because, as part of the plea agreement, petitioner waived both the right to a jury trial and the right to challenge his sentence on direct appeal or collateral review. Pet. C.A. App. C at

1. Petitioner argues primarily (Pet. 8-13) that his misconduct did not satisfy the interstate commerce element of Section 1365(a) and that his counsel incompetently failed to learn or advise him of that fact. To obtain reversal of a conviction based on ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced as a result. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). There is a "strong presumption" that counsel's performance "falls within the wide range of reasonable professional assistance." *Id.* at 689. Moreover, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985).

a. Because petitioner's misconduct affected interstate commerce, his counsel did not act unreasonably, and certainly did not cause him any prejudice, by failing to advise him to the contrary. Congress prohibited "tamper[ing] with any consumer product that affects interstate or foreign commerce." 18 U.S.C. 1365(a). OxyContin is a consumer product that affects interstate commerce because it is shipped in interstate commerce from its place of manufacture in Minnesota to other States, in this case Illinois. See Pet. App. 5a. As the court of appeals explained, petitioner's unlawful scheme therefore required "pharmacies in Illinois * * * to order more OxyContin from Minnesota to replenish their supplies." *Id.* at 6a; accord *United States* v. *Moyer*, 182

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3, 9; see Pet. App. 8a n.1 (noting that *Booker* "is not implicated in this case").

F.3d 1018, 1021 (8th Cir. 1999) (upholding Section 1365(a) conviction of physician who stole morphine from patients and replaced it with saline solution because the theft "contributed to the depletion of the hospital's morphine supply, which in turn required the hospital to order additional morphine" from out of state), cert. denied, 530 U.S. 1203 (2000).

b. Petitioner argues that Section 1365(a) should be read narrowly to require that "the effects on interstate commerce [must] occur either at the time of or after the tampering, but not before." Pet. 8 (quoting *United States* v. *Levine*, 41 F.3d 607, 613 (10th Cir. 1994)). He contends (Pet. 9) that under the Tenth Circuit's decision in *Levine*, "the place of manufacture of the consumer product has nothing to do with a § 1365 violation."

Petitioner overreads *Levine*. Although the Tenth Circuit stated in that case that "the effect on interstate commerce must occur at or after the tainting" of the product, it made clear that the interstate commerce element is nonetheless satisfied if: (i) "the product was in interstate commerce at the time of tainting"; (ii) the product "was returned to interstate commerce" after the tainting; or (iii) "there was an actual impact on interstate commerce as a result of the tainting." 41 F.3d at 614-615. The Tenth Circuit noted that—unlike the OxyContin at issue here—the product at issue there, a can of Diet Pepsi, "never left Colorado during its existence." *Id.* at 614 n.8. Nonetheless, the court held that the evidence was sufficient to support the conviction of a person who had purchased and then tainted a can of Diet Pepsi and reported the tainted can to the media. The court explained that the interstate commerce element was satisfied because, as a result of the defen-

dant's misconduct, future sales of Diet Pepsi in interstate commerce would decline. *Id.* at 615.

There is no square conflict between *Levine* and the decision below. Both courts of appeals held that the interstate commerce element was satisfied because "there was an actual impact on interstate commerce as a result of the tainting." *Levine*, 41 F.3d at 614-615. The Tenth Circuit explained that Levine caused Diet Pepsi sales to decline, *id.* at 615, while the Seventh Circuit explained that petitioner caused pharmacies in Illinois to order OxyContin from Minnesota, Pet. App. 6a. Because the Seventh Circuit's supply-and-demand analysis does not focus solely on *past* effects on interstate commerce, it is not in conflict with the Tenth Circuit's approach.[2]

Thus, although the court of appeals stated that it was declining to follow *Levine* and held that "a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce," Pet. App. 6a, that methodological disagree-

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[2] Petitioner contends (Pet. 10) that Illinois pharmacies did not need to replenish their supplies of OxyContin because his patients (to whom he prescribed the drug) "did not need it in the first place." Even assuming *arguendo* that the patients had no need for OxyContin or some other pain medication manufactured out of state, the net effect of petitioner's scheme was still to increase demand for OxyContin in Illinois, with the inevitable effect that more OxyContin had to be shipped from Minnesota to Illinois. See *Moger*, 192 F.3d at 1021-1022 (holding that it was irrelevant whether patients' use of morphine would have resulted in same depletion of supply as doctor's theft, because "[t]he fact remains that [the doctor] stole the morphine * * * and the reduction in supply was thus a result of her actions and not theirs"). Although petitioner claims (Pet. 10) that there is no record evidence to that effect, petitioner's guilty plea relieved the government of the burden of presenting evidence at trial, and the record does reflect that OxyContin is manufactured out of state. Pet. App. 20a.

ment has no significance in this case. Nor is it clear that the disagreement will be dispositive in other cases, given the fact-specific nature of the inquiry and the infrequency with which the issue arises. Indeed, *Levine* and the decision below are the only cases cited by petitioner on this issue, and both held that the interstate commerce element was satisfied.

c. To the extent that there is a methodological disagreement between the Seventh and Tenth Circuits, the decision below is correct that "a violation of § 1365(a) occurs whether the tampering takes place before, during, or after the product moves in interstate commerce." Pet. App. 6a. Congress broadly prohibited "tamper[ing] with any consumer product that affects interstate or foreign commerce." 18 U.S.C. 1365(a). Congress's use of the term "affects" commerce is significant, because the phrase "affecting commerce * * * normally signals Congress' intent to exercise its Commerce Clause powers to the full." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); see *Russell* v. *United States*, 471 U.S. 858, 859 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977).

For that reason, this Court has long construed an analogous statute prohibiting felons from possessing firearms "in or affecting commerce" (18 U.S.C. 922(g)(1)) to require only "the minimal nexus that the firearm have been, *at some time*, in interstate commerce." *Scarborough*, 431 U.S. at 575 (emphasis added). Proof that a gun traveled in interstate commerce *before* the offense is therefore sufficient to satisfy the "affecting commerce" element of a felon-in-possession charge. See *ibid.* The same analysis applies here: at a minimum, Section 1365(a) prohibits tampering with consumer products once they enter the stream of com-

merce, regardless of whether the tampering causes some additional effect on interstate commerce. Here, that means that petitioner violated the statute by tampering with OxyContin tablets after they had traveled in interstate commerce.

d. In light of that analysis, counsel did not render deficient performance in advising petitioner to plead guilty instead of pursuing an unmeritorious jurisdictional defense at trial. Indeed, counsel would have been derelict in advising petitioner to go to trial based on *Levine*, given that petitioner's conduct affected interstate commerce even under the analysis in that case. In any event, further review of the fact-specific questions whether the interstate commerce element is satisfied in this case, whether counsel acted unreasonably in recommending that petitioner accept the benefits of a plea bargain instead of attempting to prevail at trial on that issue, and whether any unreasonable performance resulted in prejudice, is not warranted.

2. Petitioner also argues (Pet. 13) that his counsel should have advised him that he could have asserted a defense of involuntary drug addiction to the charge of obtaining a controlled substance by fraud in violation of 21 U.S.C. 843(a)(3). Petitioner did not raise that contention in the court of appeals, and that court did not address it. To the contrary, petitioner *conceded* in the court of appeals that he "violated 21 U.S.C. § 843(a)(3)." Pet. C.A. Reply Br. 11; accord *id.* at 8 n.4 ("Dr. Hays is not challenging his conviction on Count 2 except to the extent that he was sentenced to the statutory maximum on Count 2 because of the greater sentence received on Count 1."). Review should be denied for that reason alone. See, *e.g.*, *Adarand Constructors, Inc.* v. *Mineta*,

534 U.S. 103, 109 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

Moreover, involuntary drug or alcohol addiction is not, standing alone, a valid defense. In addition to showing that he became addicted involuntarily, petitioner would have to show that at the time of the offense he did not know the nature and quality of his acts or know that those acts were wrong. See, *e.g.*, *United States* v. *F.D.L.*, 836 F.2d 1113, 1116-1117 (8th Cir. 1988). Petitioner could not possibly prevail on such a defense, in part because his own testimony demonstrates that he retained the capacity to make moral distinctions. For example, petitioner stated at the change-of-plea hearing that crushing OxyContin was something that he "would have never done" because it would have been "dangerous" for his patients. Pet. C.A. App. A at 35; Pet. App. 21a. At sentencing, petitioner similarly stated that he broke OxyContin tablets in half because he believed, based on consultation with a pharmacist, that doing so would not be harmful to his patients. Pet. C.A. App. B at 9-10. Counsel did not act unreasonably in failing to advise petitioner of an untenable defense, and knowledge of such a defense could not plausibly have motivated petitioner to plead not guilty. In any event, such a fact-bound claim does not warrant further review. See Sup. Ct. R. 10.[3]

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[3] Although the petition for a writ of certiorari appears to raise only an ineffective-assistance-of-counsel claim, some language in the petition might be construed to raise a separate attack on the plea based upon the contention that petitioner's plea was unintelligent and involuntary because he did not understand the elements of the crime. See Pet. 14, 15. Such a claim would be procedurally defaulted because petitioner failed to raise it on direct appeal. See *Bousley* v. *United States*, 523 U.S. 614, 621 (1998). Because petitioner cannot show any cause for that

3. Finally, petitioner claims (Pet. 13, 14), without elaboration, that "it is undisputed" that defense counsel used threats and misrepresentations to persuade him to plead guilty. As the court of appeals explained, the record does not support that claim. See Pet. App. 9a-11a. At the change-of-plea proceeding, the district judge asked petitioner whether anyone, including defense counsel, had "attempted in any way to force" him or to "put undue pressure" on him to plead guilty, and petitioner answered, "[c]ertainly not my counsels, Judge." Pet. C.A. App. A at 22. Petitioner stated in response to further questioning from the court that "nobody has * * * twisted my arm to make this plea," and that he was pleading guilty "of my own free will." *Id.* at 24; Pet. App. 10a.

Nor is petitioner entitled to relief on the ground that counsel provided him with incorrect information. Petitioner argued below that counsel erroneously told him that he would receive a prison sentence of 10-20 years if he did not plead guilty, and that a guilty plea would probably result in little or no prison time. Pet. App. 31a. Even assuming *arguendo* that counsel made those representations, both the plea agreement (Pet. C.A. App. C at 6) and the district court at the change-of-plea proceeding (Pet. C.A. App. A at 15; Pet. App. 8a) correctly informed petitioner that, barring a departure, his sentence under the Sentencing Guidelines would be 51-63 months. The district court emphasized to petitioner that he was "looking at prison time * * *, not probation" (Pet. C.A. App. A at 10), and later imposed the lowest

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failure, he would bear the burden of proving that he is actually innocent. *Id.* at 622. Petitioner cannot carry that burden. His sole claims of innocence (*i.e.*, challenges to the interstate commerce element and mental state element) lack merit for the reasons explained above.

sentence (51 months) in the range explained to petitioner. See Pet. App. 1a.

Accordingly, at the time he pleaded guilty, petitioner had an accurate understanding of the consequences of his plea. Especially in view of the benefits of the plea (including a substantial reduction in the likely sentence, see Pet. App. 8a), and the strength of the government's case (which would have included eyewitness testimony of the patients petitioner victimized, see Pet. C.A. App. A at 31), the allegedly erroneous representations of counsel could not have affected petitioner's decision to plead guilty. In any event, petitioner's fact-bound claims do not warrant further review. See Sup. Ct. R. 10.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2005

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No. 05-54

IN THE

# Supreme Court of the United States

JON RILEY HAYS,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## ARGUMENT

### I. A True Conflict As Contemplated By Supreme Court Rule 10(a) Exists Between The Tenth And Seventh Circuits In The Construction Of 18 U.S.C. § 1365(a)

The Government objects to the issuance of the certiorari writ by a new point that the Government raises in its brief:

> There is no square conflict between *Levine* and the decision below. Both courts of appeals held that the interstate commerce element was satisfied because "there was an actual impact on interstate commerce as a result of the tainting." *Levine*, 41 F.3d at 614-615. The Tenth Circuit explained that *Levine* caused Diet Pepsi sales to decline, id. at 615, while the Seventh Circuit explained that petitioner caused pharmacies in Illinois to order Oxycontin from Minnesota. [Resp. 8.]

The Government refers to the Seventh Circuit's opinion in the case at bar, *Hays v. United States*, 397 F.3d 564 (2005), wherein the Seventh Circuit engaged in pure conjecture:

> Because of the prescriptions he [Dr. Hays] wrote to facilitate his use of the drug, pharmacies in Illinois were required to order more Oxycontin from Minnesota to replenish their supplies. *Hays v. United States*, 397 F.3d at 568.

There is no citation to the record for the proposition that pharmacies in Illinois were required to order additional Oxycontin—that is because there is nothing in the record to support that proposition. Nowhere in the evidence was there any mention - in any context - of any Illinois pharmacy. As Dr. Hays has already noted, "The patients from whom Hays stole the drug did not need it in the first place. It was unnecessary for those patients to be treated with Oxycontin." Pet. 10.

More importantly, Dr. Hays did not plead to having caused Illinois pharmacies to replenish Oxycontin. Dr. Hays admitted in his plea that Oxycontin was manufactured in Minnesota. That is the only fact on the record that relates to the interstate commerce element of 18 U.S.C. § 1365(a). Under the *Levine* construction of the statute, the effects on interstate commerce must occur either at the time or after the tampering, not before. *Levine*, 41 F.3d at 613. If the *Levine* rationale is the correct construction of 11 U.S.C. § 1365(a), then Dr. Hays pleaded guilty to a non-existent crime, which is in direct, square, clear and absolute conflict with the rule established by the Seventh Circuit in the case at bar: "We find that a violation of § 365(a) occurs whether the tampering takes place before, during or after the product moves in interstate commerce." *Hays*, 397 F.3d at 568.

## II. Petitioner Hays Did Receive Ineffective Assistance Of Counsel In Pleading To A Non-Existent Crime

The Government raises the new point that Dr. Hays reads 18 U.S.C. § 1365(a) "narrowly". Resp. 7. The Government argues that if the statute is not read "narrowly", then there is merely a "methodological disagreement" between the Circuits [Resp. 9], and therefore, "in light of that analysis, counsel did not render deficient performance." Resp. 10.

The answer to the Government's claim is that Dr. Hays does not read the statute "narrowly." Rather, Dr. Hays reads it the way that Congress wrote the statute – its plain meaning. Dr. Hays reads the plain text of the statute with the same construction that the Tenth Circuit gives it. Dr. Hays believes that when Congress used the present tense of the verb "affects", Congress did not mean the past tense of that verb. In other words, Congress didn't mean "affected". To read the words as Congress wrote them is not to read the statute "narrowly". Petitioner Hays respectfully suggests that the Seventh Circuit effectively amended 18 U.S.C. § 1365(a) by writing the word "affected" into its language in the case at bar.

Dr. Hays' conduct did not violate 18 U.S.C. § 1365(a). Dr. Hays certainly did not plead to facts which would have constituted a violation of § 1365(a). None of Dr. Hays' counsel raised *Levine* to the trial court. Similar to the court in *Bousley v. United States*, "the record reveals that neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which he was charged." *Bousley v. United States*, 523 U.S. 614, 618, 188 S. Ct. 1604, 1609 (1998). Contrary to the Government's argument that Dr. Hays' counsel did not act unreasonably [Resp. 6], counsel for Dr. Hays were ineffective because they allowed him to plead to a non-existent crime. As a result of their ineffective assistance, Dr. Hays was prejudiced because he was sent to prison.

## III. If This Conflict Between The Circuits Is Not Resolved, There Will Be Many Instances In Which People Within The Seventh Circuit's Jurisdiction Will Be Sent To Prison For Violations Of 18 U.S.C. § 1365(a), While People Within The Tenth Circuit's Jurisdiction Who Commit The Very Same Acts Will Go Free

The Government raised the new point that the issue at bar will arise with "infrequency." Resp. 9. There is nothing in the record to justify that assertion. To the contrary, the innovative prosecutors who brought the case at bar converted what was essentially a simple theft to a tampering crime under § 1365(a). The charge that Dr. Hays pleaded to was a serious, violent crime, which resulted in a 51-month prison sentence. If this conflict between the Circuits is left unresolved, people in Illinois who steal pharmaceutical products (which will require Illinois pharmacies to replenish supplies of the stolen medicine) will be subject to charges under 18 U.S.C. § 1365(a). The same thing will happen in Indiana and Wisconsin. Aggressive federal prosecutors will indict and convict people within the Seventh Circuit's jurisdiction for conduct that is a non-existent crime in the Tenth Circuit.

## IV. Petitioner Hays' Plea Was Not Voluntary

The Government raises the new point that counsel who conveyed an erroneous threat of 10-20 years' prison time would not be ineffective because the trial court told Hays that he would be sentenced to less than 10-20 years. Resp. 12. The Government also argues that the record does not support the claim that Hays received threats from his lawyers to induce him to plead guilty. *Id.* The record proves exactly the opposite: Hays' sworn Motion for Relief under 28 U.S.C. § 2255 refers to the threats received from his lawyers. *See* Pet. App. H, 30a-31a. Hays' testimony is uncontradicted, unrebutted and undisputed in the record. Hays alleged that he was actually innocent and he swore that his counsel "misrepresented numerous material facts and principals (sic) of law to me." Pet. App. 30a. Hays then swore to four separate threats that his counsel conveyed to him (allegedly from prosecutors) that induced him to plead guilty. *Id.* at 30a-31a. The trial court denied Hays' Motion for an evidentiary hearing. In any event, the Government chose not to challenge Hays' sworn testimony, which had specifically and in detail outlined counsels' threats.

The Court has stated the following principle regarding the voluntariness of a guilty plea:

> [A] plea of guilty entered by one fully aware of the direct consequences of the plea is voluntary in a constitutional sense *unless induced by threats, misrepresentation, or perhaps by promises that are by their nature improper. Bousely,* 523 U.S. at 619 (citing *Brady v. U.S.*, 397 U.S. 742, 90 S.Ct. 1463 (1970)(internal quotations and ellipses omitted)) (emphasis added).

The situation contemplated by the *Bousely* court is precisely the situation in the case at bar. The undisputed fact that Hays' plea on both counts was induced by threats and misrepresentation should operate to vacate his conviction in both counts.

## CONCLUSION

A direct, square and irreconcilable conflict exists between the Tenth Circuit's *Levine* case and the Seventh Circuit's *Hays* case in the construction of 18 U.S.C. § 1365(a). This conflict will result in many people going to prison in Illinois, Indiana and Wisconsin for the same conduct that is a non-existent crime in Colorado, Utah, Wyoming, Kansas, Oklahoma and New Mexico. Hays' counsel were ineffective because counsel induced him to plead guilty to a non-existent crime and also induced him to plead guilty to both counts of conviction through threats and misrepresentation.

Respectfully submitted,

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